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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, and NEW YORK TELEPHONE COMPANY,
Petitioners,

v.

DISCON, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* GTE CORPORATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The questions presented in the Petition for a Writ of Certiorari, on which the Court granted review, are:

When a Purchaser agrees to buy from Supplier A rather than Supplier B, and there is no issue of any horizontal restraints or vertical price restraints:

1. May the agreement between Purchaser and Supplier A be characterized as a group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1?

2. May the agreement between Purchaser and Supplier A be characterized as a conspiracy to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2?

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BRIEF OF *AMICUS CURIAE* GTE CORPORATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

GTE Corporation has various subsidiaries (collectively, "GTE") that offer local telephone service to millions of customers throughout 28 States. GTE also offers long distance, data, and wireless services, as well as many other telecommunications products, to customers across the Nation.[1]

To deliver voice and data telephony to its customers, GTE must build, operate, and maintain vast and highly complex telecommunications networks. To provide local telephone service to a single city, for example, GTE must build lines that branch out from a central office to every single business and

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[1] Pursuant to Rule 37.6, GTE Corporation states that this brief was not prepared, written, funded, or produced by any person or entity other than GTE Corporation or its counsel. Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

residence, and must connect all of these lines with a series of switches that route calls to desired destinations. Even this small local network requires constant monitoring and management by personnel who do everything from processing new orders to resolving trouble reports from customers.

No telecommunications provider could operate a business of this complexity without buying products and services — from the pens and paper clips needed to furnish its offices to the fiber-optic cables needed to connect its customers — from thousands of different vendors. And frequently, the most efficient method of acquiring these goods and services is by entering into exclusive agreements with individual suppliers.

GTE, like many other businesses, has long been able to enter into such agreements secure in the knowledge that they would be subjected to antitrust scrutiny, if at all, only under a deferential rule of reason. The decision below destroyed that certainty by holding that some *vertical* nonprice agreements could be deemed *horizontal* group boycotts (and hence *per se* illegal), and by suggesting that an alleged regulatory violation in a downstream market might violate the antitrust laws, even in the absence of any demonstrated antitrust injury to the plaintiff.

As a result, the Second Circuit has undermined GTE's ability to plan its business rationally and efficiently, and exposed the company to a risk of litigation — and treble damage liability — for negotiating agreements that have long been afforded great solicitude under the antitrust laws. GTE therefore has an interest in urging this Court to reverse the judgment below.

INTRODUCTION

The decision below drew upon idiosyncratic facts to overturn long-settled principles of antitrust law. The agreement at issue here — allegedly motivated by a local telephone company's desire to pass on excessive costs to captive

ratepayers — could have come about only where a monopolist subject to rate-of-return regulation is on the buying end of an exclusive supply contract. This factual scenario is now largely obsolete, both because state and federal regulators have largely eliminated rate-of-return regulation, and because the introduction of competition into local telephone markets (and many other markets previously served by regulated monopolists) now precludes carriers from passing excessive charges on to customers. Nevertheless, the Second Circuit shoehorned this unlikely vertical agreement into an inapplicable horizontal category of *per se* illegality. By so doing, that court established a broad rule that calls into question an extraordinary number of once-permissible vertical nonprice agreements, and created an intolerable level of uncertainty with respect to the lawfulness of exclusive supply contracts.

That uncertainty is vastly magnified by the fact that the decision below failed to establish any workable standard for identifying when the new *per se* standard should apply. The Second Circuit held not only that two-party vertical agreements could be condemned as *per se* illegal horizontal group boycotts when they have horizontal effects (as do all exclusive supply contracts), but also that this draconian standard could apply whenever no "pro-competitive rationale [for the agreement] appears on the face of the complaint." Pet. App. 12a. The new vertical *per se* rule announced below is therefore limited only by the ability of the plaintiffs' bar to draft artful complaints, omitting allegations unhelpful to any plaintiff's case. This "standard" is no standard at all, and threatens to undermine this Court's command that the evidentiary standards of the antitrust laws must not "deter or penalize perfectly legitimate conduct." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984).

SUMMARY OF ARGUMENT

1. In an unbroken line of cases over the past two decades, this Court has made clear that *all* vertical nonprice agreements are subject to antitrust scrutiny under the deferential rule of reason rather than any rigid rule of *per se* illegality. Beginning with *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), this Court has consistently held that any anticompetitive effects "from particular vertical restrictions . . . can be adequately policed under the rule of reason." *Id.* at 59. That principle was reaffirmed in *Monsanto*, 465 U.S. at 761, *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 724-26 (1988), and (most recently) in *State Oil v. Khan*, 118 S. Ct. 275, 279-84 (1997).

The decision below marked a clear and unwarranted departure from this controlling authority. Although the Second Circuit recognized that the contract at issue here was "an agreement between two firms . . . in a vertical relationship," it nevertheless held that some such agreements could be characterized as a *per se* illegal horizontal group boycott if the "intent and effect" of the agreement is "to disadvantage the direct competitor . . . of one of the conspiring firms." Pet. App. 10a-11a (citing *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)).

A vertical agreement, however, cannot be transmogrified into a horizontal restraint of trade simply because "it has horizontal effects." *Business Electronics*, 485 U.S. at 731 n.4. *All* vertical nonprice agreements, regardless of whether they have horizontal effects, must be judged under the rule of reason. *See, e.g., State Oil*, 118 S. Ct. at 281. The decision below cannot be squared with these precedents.

Indeed, it would make little sense to use this case as the vehicle for announcing a new category of *per se* illegal vertical agreements. There is no reason to think that businesses generally have any incentive to enter into agreements to

purchase exclusively from high-cost suppliers. This case is unusual because, at the time of the challenged conduct, petitioners were regulated monopolists who allegedly sought to evade rate-of-return regulation by inflating the charges passed on to ratepayers. Legislative and market developments, however, have rendered this factual scenario largely obsolete. Congress opened the market for local telephone service to competition by enacting the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified throughout 47 U.S.C.), as part of a broader trend of introducing competition to markets once controlled by regulated monopolists. Not only will the discipline of competition keep any previously-regulated utilities from passing on excessive charges to consumers, but a battery of regulatory enforcement mechanisms are already in place to foil any such scheme. No new *per se* rule is either necessary or appropriate in this swiftly changing area.

2. The United States and the Federal Trade Commission fare no better in endorsing a heightened standard of review, rather than the rule of reason, for assessing whether the agreement challenged here violates the Sherman Act. Under such a heightened standard, the defendant would have to establish a pro-competitive justification for its conduct *before* the plaintiff was required to carry its burden of proving that the agreement threatened any anticompetitive injury. *See also* Pet. App. 12a (suggesting that the first step in deciding whether a vertical agreement violated the Sherman Act was to scrutinize "the business justifications for the agreement").

This approach, which effectively reverses the burden of proof, has been applied only in cases involving a "naked" horizontal restriction on price or output. *See, e.g., FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986); *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 (1984). It has never been extended to a case involving a vertical agreement, for the simple reason that vertical agreements are presumptively lawful.

Such a heightened standard, if endorsed here, would permit antitrust plaintiffs to proceed to trial without offering *any* evidence that a vertical nonprice agreement had *any* anticompetitive effects, and would thereby open the floodgates to strike lawsuits challenging legitimate business decisions.

3. Analyzed under the rule of reason, respondent's complaint must be dismissed as a matter of law. Only those restraints that threaten the creation or exercise of monopoly power in a given market (here, the market for telephone equipment removal services) are unreasonable and hence unlawful. Although the complaint challenges petitioners' motives for entering into an exclusive contract with another supplier (AT&T), that challenge alone is not enough to establish an unreasonable restraint of trade. Rather, to satisfy this standard, respondent must also allege that it would have received more business from petitioners — *i.e.*, that the exclusive agreement reached between petitioners and AT&T would not have been reached — in a competitive market.

The antitrust laws, as this Court has emphasized time and again, protect "competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (citation omitted). It is the very essence of a free-market economy that some firms will lose business to other firms. Such a loss does not, in and of itself, implicate any antitrust injury, even where the losing firm goes out of business. Nothing in respondent's complaint negates the possibility that AT&T was the more efficient supplier of removal service, and therefore that respondent suffered no antitrust injury by losing business to AT&T. In the absence of such an allegation, respondent has alleged nothing more than a regulatory violation in a downstream market — an injury that it has no standing to raise, and that is policed by a comprehensive regulatory regime. Respondent, in short, has at most alleged a violation of telecommunications regulations rather than the antitrust laws.

The Second Circuit therefore erred by reversing the district court's judgment dismissing the complaint.

ARGUMENT

I. EXCLUSIVE SUPPLY AGREEMENTS INVOLVING REGULATED INDUSTRIES SHOULD NOT BE DEEMED *PER SE* ILLEGAL.

In an unbroken line of cases over the past twenty years, this Court has repeatedly reaffirmed the principle that vertical nonprice agreements are not *per se* illegal, but must be evaluated under the rule of reason. *See State Oil*, 118 S. Ct. at 281 (case law rejects the "application of a *per se* rule in the context of vertical nonprice restrictions"); *Business Electronics*, 485 U.S. at 724 (the Court has "refused to extend *per se* illegality to vertical nonprice restraints"); *Monsanto*, 465 U.S. at 761 ("[C]oncerted action on nonprice restrictions . . . [is] judged under the rule of reason."); *GTE Sylvania*, 433 U.S. at 58 (rejecting antitrust claim where no showing made "that vertical restrictions have or are likely to have a 'pernicious effect on competition'") (citation omitted).

Notwithstanding this line of cases, the Second Circuit held that two-party vertical agreements — *i.e.*, all exclusive supply contracts — are properly analyzed as *per se* illegal horizontal group boycotts if the "intent and effect" of the agreement is "to disadvantage the direct competitor . . . of one of the conspiring firms." Pet. App. 10a-11a (citing *Klors*, 359 U.S. at 211-12). That conclusion has no basis in law or economic reality.

Indeed, the Second Circuit's approach would altogether obliterate the distinction between vertical and horizontal restraints, "since all anticompetitive effects are by definition horizontal effects." *Business Electronics*, 485 U.S. at 730 n.4. That is precisely why this Court has expressly rejected the notion that vertical agreements with horizontal effects can be reclassified as horizontal restraints. Any such effort would only

"introduce[ ] needless confusion into antitrust terminology," and would defeat the common-sense rule that "[r]estraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Id.* at 730. The court below simply ignored this Court's teaching that "a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement." Id. at 731 n.4; *see also* ABA Section of Antitrust Law, *Statement on Discon v. NYNEX* at 4-5 ("Characterizing a vertical agreement as horizontal because it has horizontal effects . . . contradicts at least eighty years of antitrust jurisprudence and deprives courts and businesses of a clear rule that has long assisted the adjudication of antitrust cases and the determination of what conduct runs afoul of the antitrust laws.") (visited May 28, 1998) (http://www.abanet.org/antitrust/discon.html).

There is no basis for applying a *per se* rule of illegality to vertical nonprice agreements. Rules of *per se* illegality are the exception, not the norm, in antitrust analysis. *See, e.g., State Oil*, 118 S. Ct. at 279. As this Court has explained, such rules are applied only to limited categories of restraints that have "predictable and pernicious anticompetitive effect," and "limited potential for procompetitive benefit." *Id.* Except in these narrow categories, the default rule of reason applies. *See id.*; *see also GTE Sylvania*, 433 U.S. at 58-59 ("[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect.").

There is simply no basis for applying a rule of *per se* illegality to the vertical nonprice agreement challenged here. As this Court has noted, vertical agreements are "widely used in our free market economy." *GTE Sylvania*, 433 U.S. at 57. The Second Circuit made no attempt to determine that exclusive supply contracts have "predictable and pernicious anticompetitive effects" and "limited potential for

procompetitive benefits" so as to warrant the establishment of a *per se* rule of illegality. Quite the contrary is true: the settled rule has long been that a buyer of goods or services is free to buy from the supplier of its choice and to set the terms on which it will deal. *See, e.g., United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself.") (citation omitted).

Indeed, it is hard to see how the Second Circuit's novel rule of *per se* illegality would combat "predictable and pernicious anticompetitive effects" in the economy as a whole. A buyer of goods or services generally has no incentive to enter into an agreement to buy exclusively from a higher-cost supplier — in our free market system, any scheme to pass on inflated prices to customers is doomed to failure. The scheme alleged here could work only where (as was true here at the time of the challenged agreement) the defendant is a monopoly subject to rate-of-return (or "cost-plus") regulation.

But these regulated monopolies are already subject to comprehensive oversight to ensure that they do not pass on inflated costs to consumers. The FCC and most state public utility commissions have abandoned rate-of return regulation in favor of price-cap regimes.[2] Under the old cost-plus system, local carriers arguably had an incentive to overstate their costs because their level of return was pegged directly to their costs of providing local service. Recognizing the potential

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[2] Local carriers receive two different types of compensation for operating their networks. First, they are paid directly by local customers for the use of their local networks. These intrastate charges are regulated by state public utility commissions. Second, local carriers are paid by long distance providers for the right to terminate calls on their local networks. These "access charges," which are ultimately passed on to long distance customers, are regulated by the FCC. *See* First Report and Order, *Access Charge Reform*, 12 F.C.C.R. 15982 ¶ 7 (1997) (hereinafter *Access Charge Reform Order*).

disadvantages of this system, the FCC and state commissions replaced rate-of-return regulation with a price cap regime that limits the prices "carriers may charge" for local service, and treats "most changes in a carrier's costs . . . as 'endogenous,' which means that they do not result in adjustments to the carrier's price cap indices." Order, *Accounting Safeguards Under the Telecommunications Act of 1996*, 11 F.C.C.R. 17539 ¶ 259-60 (1996). Consequently, local carriers are denied any opportunity to overcharge for local service, because these price cap rules keep them from recovering costs unfairly allocated to local service.

Moreover, local telephone companies must comply with highly detailed accounting rules governing the charges that can be passed on to customers. *See* 47 C.F.R. § 32.1 *et seq.* (providing an exclusive list of costs that can be allocated to a carrier's provision of local telephone service). The FCC and state public utility commissions also investigate any complaints against a local carrier for overcharging customers, and have the power to issue large fines against carriers that pass on inflated costs. Indeed, administrative proceedings were initiated against petitioners, resulting in a settlement that required multi-million dollar payments to ratepayers and the federal government. *See* Order, *New York Telephone Co. & New England Tel. & Tel. Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates*, 5 F.C.C.R. 5892 (1990).

In any event, it would be the height of irony for this Court to announce a new antitrust rule of *per se* illegality limited to regulated industries at the very moment in history when such industries are for the first time being opened up to competition. *See, e.g.*, John B. McArthur, *Anti-Trust in the New [De]Regulated Natural Gas Industry*, 18 Energy L.J. 1, 6 (1997) ("In market after market, from airlines to banking, trucking to telephones, electricity to natural gas, the cost-of-service edifice has been wholly or partly dismantled."). In the

market for local telephone service, for example, the Telecommunications Act of 1996 was expressly designed to open local markets to competition. Section 253(a) of the Act revoked all state-granted monopoly franchises held by local providers, and sections 251-52 established multiple avenues for competitive entrants to begin offering local service. *See* 47 U.S.C. §§ 251-53; *see also Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 791-92 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 879 (1998). The Act has therefore effectively stripped local carriers of any hypothetical ability to overcharge ratepayers by passing on inflated costs, because any carrier that did so would see its market share swiftly diminish. *See Access Charge Reform Order* ¶ 280 (any effort to pass on excessive costs to local customers is "likely to induce substantial additional entry in local markets").

It is neither necessary nor appropriate, in short, for this Court to declare exclusive supply agreements *per se* illegal in the limited context of regulated industries. The flexible rule of reason is more than up to the task of policing the antitrust implications of such agreements. The Second Circuit held otherwise only by blurring the bedrock distinction between horizontal and vertical restraints that is a core analytical tenet of modern antitrust law. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1644c at 727-28 (1997 Supp.) (criticizing the Second Circuit's decision because the "purpose of the *per se* rule dispensing with proof of power and effects is not to turn fraud claims — even those deceiving consumers and causing higher prices — into antitrust violations"). This Court should restore clarity to this important area of the law by reaffirming that distinction and the corollary principle that vertical nonprice restraints are subject to antitrust analysis under the rule of reason.

II. EXCLUSIVE SUPPLY AGREEMENTS INVOLVING REGULATED INDUSTRIES SHOULD NOT BE SUBJECTED TO HEIGHTENED ANTITRUST SCRUTINY.

The United States and the Federal Trade Commission pointedly decline to defend the Second Circuit's adoption of a *per se* rule of illegality, but suggest that an analogous heightened standard of antitrust review, rather than conventional rule-of-reason analysis, might apply. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae at 16-17; *see also* Joel I. Klein, *Review of Horizontal Agreements — Procompetitive Effects*, 7 Trade Reg. Rep. (CCH) ¶ 50,157, at 49,191 (Nov. 7, 1996). In particular, the Government endorses the Second Circuit's assertion that antitrust liability should be presumed in the absence of any evident "pro-competitive rationale" for the challenged agreement. Pet. App. 12a. Under the Government's approach, a defendant would be required to establish a pro-competitive justification for a challenged agreement *before* the plaintiff was required to establish the agreement's anticompetitive effects.

That approach is wholly unwarranted in this case. Such heightened scrutiny has been applied only to uniquely anti-competitive *horizontal* restraints. *See Indiana Fed'n of Dentists*, 476 U.S. at 460 ("As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output.") (citation omitted); *NCAA*, 468 U.S. at 110 ("This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."); *see also* Joel I. Klein, *A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, Antitrust, Spring 1998, at 42 ("[T]he stepwise approach . . . applies only to horizontal agreements that directly limit competition."). But this heightened standard has *never* been applied to any type of *vertical* agreement. Applying this standard, rather than the

default rule of reason, to vertical nonprice agreements is wholly unwarranted for the very same reasons that a *per se* rule of illegality is unwarranted — there is no reason to assume that vertical nonprice agreements are anticompetitive.

Indeed, importing this heightened horizontal standard into the vertical sphere will do nothing but "deter or penalize perfectly legitimate conduct." *Monsanto*, 465 U.S. at 753. This standard effectively reverses the burden of proof in antitrust cases, requiring the defendant to justify its conduct before putting the plaintiff to its proof of anticompetitive injury. By turning the ordinary antitrust burden of proof upside down, this standard allows plaintiffs to proceed to trial without offering *any* evidence that the challenged agreement has *any* anticompetitive effects. Unless and until the plaintiff proves such effects, there is simply no basis to impose antitrust liability for vertical nonprice agreements. Unless and until the plaintiff satisfies this burden, the defendant need not proffer any "business justifications" or "pro-competitive rationale" for the agreement. Pet. App. 12a. The Government's burden-shifting approach, if embraced by this Court, would give an extraordinary new weapon to disappointed bidders for exclusive contracts, and create an intolerable threat that legitimate, efficient business decisions will be deterred by the threat of strike lawsuits.

III. THE VERTICAL SUPPLY AGREEMENT AT ISSUE HERE SATISFIES THE RULE OF REASON.

Every commercial agreement, particularly an exclusive supply contract, restrains trade in some limited sense. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985). By agreeing to buy an input from only one seller, a buyer restricts the universe of purchasers available to other suppliers in the market. But section 1 of the Sherman Act does not prohibit all such agreements, the great majority of which have profoundly pro-

competitive effects. Section 1 prohibits only unreasonable restraints of trade. *See State Oil*, 118 S. Ct. at 279.

To determine whether a challenged agreement satisfies the rule of reason, a finder of fact must take "into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Id.* Ultimately, the rule of reason condemns only those restraints that threaten the creation or exercise of monopoly power "in a properly defined relevant market." Areeda, *supra*, at 727.

Here, the relevant market is the one in which respondent participates — the market for telephone equipment removal services — not the downstream market for local telephone service. Although respondent's complaint alleges that petitioners used their market power to overcharge purchasers of local telephone service, respondent lacks standing even to raise that claim. *See Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 205, 207 (1990) (only "immediate buyers from the alleged antitrust violators" have standing to sue for inflated utility charges, not entities suing in "*parens patriae*"). Moreover, not every action that has the effect of raising prices violates the Sherman Act. The antitrust laws are concerned with competition, not the overall business practices of regulated industries. Any injury suffered by telephone ratepayers is policed not by the antitrust laws, but by the comprehensive regulatory regime governing the rates of local telephone carriers. *See supra* at 9-10. This Court should not allow the Sherman Act to swallow up the rest of the U.S. Code.

Under a proper rule-of-reason analysis, the key question is whether respondent has alleged any anticompetitive conduct in the market for telephone equipment removal services. When viewed through this lens, it is clear that respondent's complaint alleges only a plain-vanilla violation of telecommunications

regulations rather than an unreasonable restraint of trade in violation of the antitrust laws.

To establish an unreasonable restraint of trade, a supplier must do more than allege that it lost an opportunity to serve a buyer — otherwise, disappointed bidders for every exclusive contract would have a cause of action. Indeed, it is axiomatic that antitrust laws are concerned not with whether one competitor or another succeeds in the marketplace, but whether competition is harmed generally. *See Brunswick Corp.*, 429 U.S. at 488.

This limitation must be enforced with particular rigor in markets where the demand for a particular service is limited. Telecommunications carriers (and other regulated utilities) often require services not demanded by other consumers — the market for telephone removal services is a case in point. In such cases, a buyer's decision to negotiate an exclusive supply agreement may leave other suppliers without enough demand to sustain their business, effectively driving them out of the market. Nonetheless, it is the buyer's prerogative to buy from the supplier of its choice and to set the terms on which it will deal. *See Colgate*, 250 U.S. at 307.

Although respondent's complaint challenges petitioners' motives for entering into an exclusive contract with AT&T, that challenge alone is not enough to establish an unreasonable restraint of trade in the market for telephone removal services. *First*, respondent must also allege some kind of market-wide restraint that has a broader competitive impact than simply precluding one supplier from offering service to one particular customer. *Second*, respondent must allege that there are barriers to entry in the market for removal services that would permit an anticompetitive restraint to have some lasting anticompetitive effect. *Third*, respondent must establish that it would have received more business from petitioners — *i.e.*, that

the exclusive agreement reached between petitioners and AT&T would not have been reached — in a competitive market.

Respondent's complaint does not include any of these necessary allegations, which cannot be assumed or inferred from the fact that respondent lost business. Petitioners may have had legitimate business reasons (over and above any improper motive) to purchase removal services exclusively from AT&T. For example, aggregating removal business in one firm could allow petitioners to benefit from economies of scale or could decrease the administrative costs associated with contracting for removal services over a large territory.

Indeed, even assuming hypothetically that a carrier might hope to buy removal services at inflated prices and demand a secret rebate, its incentives in selecting an exclusive removal services supplier would be identical to those it would face in a competitive market. On one hand, selecting an inefficient supplier of removal services would only limit the size of the rebate the carrier could receive. On the other hand, selecting the most efficient supplier would maximize the amount of the surplus created by the scheme — maximizing the carrier's return. Although it is possible that the carrier might select a less efficient provider if the market leader refused to offer rebates, it is nevertheless an essential element of the passed-over supplier's claim that it was the superior provider of removal services. Otherwise, the losing supplier has suffered no antitrust injury — it was vanquished because it was the lesser competitor, not because it refused to offer secret rebates.

Respondent's complaint fails on this ground, because it does not allege that petitioners would have acted any differently in a competitive market. The complaint alleges nothing more than a scheme by petitioners to inflate the rates they charge their local telephone customers. To state a claim under the Sherman Act, respondent must allege more. It must allege some injury cognizable under the antitrust laws — something more than a

simple fraud or regulatory violation resulting in higher prices for downstream consumers. Any other rule would transform the antitrust laws into a all-purpose code of business regulation.

CONCLUSION

For all the foregoing reasons, as well as those set forth in petitioners' brief, the judgment below should be reversed.

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